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United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 15485
CIVIL

CHICAGO GREAT WESTERN RAILWAY COMPANY, A CORPORATION,

Appellant,

vs.

LEON SCOVIL,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT,
DISTRICT OF MINNESOTA.

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United States District Court,
District of Minnesota,
Third Division.

Civil
No. 2698

Leon Scovel,

Plaintiff,

vs.

Chicago Great Western Railway Company, a corporation,

Defendant.

Appearances:

Charles Hvass, Esq., Minnesota Federal Building, Minneapolis, Minnesota, attorney for plaintiff.

David Grannis, Esq., South St. Paul, Minnesota, attorney for defendant.

(Prefatory Note: Appellant failed to include in the Record the testimony taken by way of deposition and introduced in evidence of Kenneth Dobb, LaVerne Kock, Robert Stone and F. N. Scovel. The depositions were taken at the instance and request and upon written notice of appellant and although introduced as a part of the plaintiff's case the statements made in advance of the introduction of the depositions in evidence clarify the manner in which the depositions were used. It is appellee's contention that the testimony hereinafter set forth in narrative form is essential for consideration by this Court in deciding the case pursuant to Rule 10 (b) (c) of the Rules of the United States Court of Appeals for the Eighth Circuit.)

Mr. Hvass: We will first read in evidence the deposition of Kenneth Dopp. I don't think it is necessary for the reporter to take it, we have the depositions here, only those parts objected to.

The Court: Is there any objections of note here in the deposition you want me to rule on?

Mr. Hvass: I figured when Mr. Grannis asked his questions he could use this and when I asked my questions, I could use it.

Mr. Grannis: If I want to put any objections in I will do it when the answer is read. Is that agreeable?

Mr. Hvass: That's agreeable.

Mr. Grannis: And the same with Mr. Hvass.

Mr. Hvass: Yes.

Depositions of Kenneth Dopp, LaVerne Kock, Robert Stone, Neal Scovel and Leon Scovel, witnesses of lawful age, taken on behalf of the defendant in the above entitled cause, wherein Leon Scovel is the plaintiff, and Chicago Great Western Railway Company, a corporation, is the defendant, pending in the District Court of the United States for the District of Minnesota, Third Division, pursuant to notice, a copy of which is hereto attached, before Searl Hoseley, a Notary Public in and for Clayton County, Iowa, with commission filed in Buchanan County, Iowa, at the passenger depot of the Chicago Great Western Railway Company at Lamont, Iowa, on the 22nd day of April, 1955.

KENNETH DOPP, a witness named in the annexed notice, being of lawful age, and being first duly sworn in the above cause, testified on his oath as follows:

Direct Examination by Mr. Grannis.

My name is Kenneth Dopp and I live in Oelwein, Iowa. I am a farmer and also work part time for the defendant. On June 25, 1953, I was working for defendant as a section laborer. It was a damp, rainy morning. I reported for work at our tool house in Lamont, Iowa, at a quarter after 8:00 or 8:30 a.m. There were 13 or 14 men on the section gang and Leon Scovel was the foreman.

We loaded the push car, which is a small car about 4½ to 5 feet by 6½ feet, with tools. We hooked the push car

behind the motor car and the men boarded the motor car and push car. There were probably 8 men on the motor car and the rest went on the push car.

Neal Scovel was operating the motor car and Leon Scovel was sitting on a water keg on the back end of the push car pretty close to the middle. Ralph Graves was sitting on the front part of the push car. Mr. Stone was sitting behind Graves. We were headed east from Lamont to Oneida, and an accident occurred about 2½ miles from Lamont.

The motor car was traveling east about 10 to 15 miles per hour and the first I knew of an accident was when I heard somebody holler. I looked and saw Graves dragging, hung by his elbows to the push car. I didn't see him fall. I saw Scovel get off the water keg and reach for Graves. Graves was under the push car holding onto the grab bar.

The trip had proceeded in a normal way and I do not remember any difficulty. The push car and motor car were hooked together by a coupler and two pins about 9 or 10 inches, which is the way they were always hooked. I saw Scovel fall. He was reaching for Graves and Neal Scovel started to slow the motor car down. At that time Lee thought that the motor car and push car were bumping together. That is the way it looked. He reached his hands out to grab hold of the bar of the motor car and at that time Neal started the motor car up because it looked like they were going to hit, and about that time Leon lost his balance.

I don't know at what time the motor car and push car parted. The men on the motor car jumped off and grabbed the push car to stop it. Neal stopped the motor car. I don't know how Graves and Stone were seated on the push car.

Cross Examination by Mr. Hvass.

The front end of the motor car was headed east as we left Lamont. I was sitting in the first or second seat on the south side of the motor car, which would be the right side

of the motor car. There is a bar about 16 inches to 2 feet long between the motor car and the push car.

The push car is a flat bed car with a piece of pipe at each end which is used as a handle to lift the push car. The coupler that comes from the push car runs up to the center of this pipe and there is a hole through it. The end of the draw bar fits over the bottom and top of the coupler and a pin drops through the holes in the draw bar and the hole in the coupler.

On the day of the accident a pin was placed through the draw bar both at the motor car end and the push car end. The section of track along which we were proceeding caused the push car and motor car to jump around a little bit, but not too awful bad. It was rough, but it wasn't too rough. It wasn't what I would call awful rough. The push car jumped around more than the motor car.

The push car wasn't too good. The wheels were out of alignment. I have worked for two seasons for the defendant and have seen trailer cars that were specifically used for transportation of men working on the section while I have been in Oelwein. These trailer cars have never been furnished for the section crew at Lamont. I don't know if Scovel ever asked for trailer cars, but I know he has asked for a new push car. The trailer cars have special seats on them and have handholds so the men can hang onto them as they ride. There were no places to hold onto on the push car we were using at the time of the accident. The push car consisted of strips of plank laid across a frame.

The push car shown in Plaintiff's Exhibit 1 is the same type of push car used at the time of the accident. It is approximately identical. It shows the approximate general condition of the push car.

After the accident the pin was not in the draw bar as far as I remember. It seems like the crew looked for the pin and found it, but I can't remember for sure. I remember Greene looking for it, but I don't remember if he found it. Both the front and rear pipes attached to the push car were intact after the accident.

Re-Direct Examination by Mr. Grannis.

The track at the place of the accident was like most any part of the track on the main line of the defendant. The joints were rough and kind of rough on the push car and motor car. It wouldn't have been for a train, but the car just jumps when it hits them. This is an ordinary occurrence.

We had two push cars, one fairly good one and one high wheeled one. I can't state positively if the push car in Plaintiff's Exhibit 1 was the push car used. The motor car shown in Defendant's Exhibit A is not the motor car used at the time of this accident. I don't know about the push car. The motor car had a little bigger motor and probably a little bigger car. The push car could be the same. We were going up a grade before the accident at a speed of approximately ten miles per hour. The accident happened just after we made the hill, just after we passed the crest and leveled off, about two and a half miles east of Lamont.

I worked the summer and fall, three, probably five or six months. I worked two months this summer for the defendant.

I don't know what caused the pin to come out of the coupler and I don't know when the cars parted.

LAVERNE KOCK, a witness named in the annexed notice, being of lawful age, and being first duly sworn in the above cause, testified on his oath as follows:

Direct Examination by Mr. Grannis.

My name is LaVerne Kock. I live a mile south of Maryville. I am a farmer now engaged in farming. I worked for the defendant in June of 1953 and was working on June 25, 1953. I was a section laborer and reported for work at Lamont about 10 minutes to 8:00 in the morning. There were about ten men in the crew, including Mr. Scovel, the foreman. He directed our operations that day.

We put the motor car and push car on the track and loaded the tools. Then we started for Oneida where we were going to do some work. I sat on the south side in front on the push car. Mr. Scovel sat on the push car, but I don't know exactly where. I don't know where Graves was sitting.

It was misting out. About two and a half miles from Lamont, we had just gotten over a hill, when the accident happened. We were traveling about ten miles per hour. The first thing I knew was when someone hollered. I looked back and couldn't see any accident. I saw Lee raise up and lean over. We were starting to slow down and Lee leaned forward to hold the two cars apart.

I didn't know they were uncoupled yet. The motor car started out again. Lee lost his balance and the cars came apart.

I noticed Graves was dragging. The first time I realized the cars were apart was when I saw Scovel lose his balance. I then saw Ralph Graves was dragging, holding onto the bar of the push car.

The track was in good condition where the accident happened. I had nothing to do with the coupling, but helped load the tools. Nothing occurred from the time we left until the accident happened which was not normal so far as the usual procedure was concerned. I don't know how the coupling came uncoupled. All I know is Scovel lost his balance and fell in front of the push car. I know that the push car and motor car had parted when Scovel fell, I don't know how long before that.

The push car was in fair condition. The push car and motor car shown in Defendant's Exhibit A are similar to the ones used on the day of the accident. I think the push car is the same. I don't know if the motor car is. The coupling shown in Defendant's Exhibit A is the same manner in which the push car and motor car were hooked up the day of the accident. The pins were approximately eight to ten inches in length.

Cross Examination by Mr. Hvass.

The push car shown in Plaintiff's Exhibit 1 looks similar to the one involved in the accident. The push car shown in Defendant's Exhibit A and Plaintiff's Exhibit 1 look to be the same.

I have been to Oelwein a number of times. I have never seen the trailer cars in Oelwein. I have heard that the defendant has trailer cars for men to ride on. The cars we rode on were flat bed cars with no place to hold onto, and no seats.

The usual type of pin is the one shown in Defendant's Exhibit A. I have been working when the road master has been around and he has seen this type of pin. Neither the division engineer nor the road master has told us not to use that type of pin. I don't know how the cars were attached.

Scovel was getting the line-up when the push car and motor car were attached. He wasn't there at the time. Whoever was closest to the draw bar would insert the pin. It doesn't take any skill to insert the pin. There are two flanges on the draw bar that fit over the coupler. There is a hole in both flanges on the draw bar and in the coupler. The pin fits through these holes.

Mr. Scovel warned me at one time not to ride with my feet on the motor car when I was sitting on the push car. I took my feet off the motor car when I was warned. Mr. Scovel has warned others about sitting on the push car and putting their feet over on the motor car. The day of the accident Mr. Scovel told the men about their feet. I don't know if he told Graves personally, but I do know that Graves heard it.

We had two push cars at the time of the accident and one was left at Lamont because it is difficult to pull two push cars with a motor car. The push car left at Lamont was not in the best condition. We picked the best push car. The one selected was in better condition than the one left at Lamont.

The first I knew something was wrong was when I heard a yell. I saw Lee Scovel reach out for the motor car and at

We put the motor car and push car on the track and loaded the tools. Then we started for Oneida where we were going to do some work. I sat on the south side in front on the push car. Mr. Scovel sat on the push car, but I don't know exactly where. I don't know where Graves was sitting.

It was misting out. About two and a half miles from Lamont, we had just gotten over a hill, when the accident happened. We were traveling about ten miles per hour. The first thing I knew was when someone hollered. I looked back and couldn't see any accident. I saw Lee raise up and lean over. We were starting to slow down and Lee leaned forward to hold the two cars apart.

I didn't know they were uncoupled yet. The motor car started out again. Lee lost his balance and the cars came apart.

I noticed Graves was dragging. The first time I realized the cars were apart was when I saw Scovel lose his balance. I then saw Ralph Graves was dragging, holding onto the bar of the push car.

The track was in good condition where the accident happened. I had nothing to do with the coupling, but helped load the tools. Nothing occurred from the time we left until the accident happened which was not normal so far as the usual procedure was concerned. I don't know how the coupling came uncoupled. All I know is Scovel lost his balance and fell in front of the push car. I know that the push car and motor car had parted when Scovel fell, I don't know how long before that.

The push car was in fair condition. The push car and motor car shown in Defendant's Exhibit A are similar to the ones used on the day of the accident. I think the push car is the same. I don't know if the motor car is. The coupling shown in Defendant's Exhibit A is the same manner in which the push car and motor car were hooked up the day of the accident. The pins were approximately eight to ten inches in length.

Cross Examination by Mr. Hvass.

The push car shown in Plaintiff's Exhibit 1 looks similar to the one involved in the accident. The push car shown in Defendant's Exhibit A and Plaintiff's Exhibit 1 look to be the same.

I have been to Oelwein a number of times. I have never seen the trailer cars in Oelwein. I have heard that the defendant has trailer cars for men to ride on. The cars we rode on were flat bed cars with no place to hold onto, and no seats.

The usual type of pin is the one shown in Defendant's Exhibit A. I have been working when the road master has been around and he has seen this type of pin. Neither the division engineer nor the road master has told us not to use that type of pin. I don't know how the cars were attached.

Scovel was getting the line-up when the push car and motor car were attached. He wasn't there at the time. Whoever was closest to the draw bar would insert the pin. It doesn't take any skill to insert the pin. There are two flanges on the draw bar that fit over the coupler. There is a hole in both flanges on the draw bar and in the coupler. The pin fits through these holes.

Mr. Scovel warned me at one time not to ride with my feet on the motor car when I was sitting on the push car. I took my feet off the motor car when I was warned. Mr. Scovel has warned others about sitting on the push car and putting their feet over on the motor car. The day of the accident Mr. Scovel told the men about their feet. I don't know if he told Graves personally, but I do know that Graves heard it.

We had two push cars at the time of the accident and one was left at Lamont because it is difficult to pull two push cars with a motor car. The push car left at Lamont was not in the best condition. We picked the best push car. The one selected was in better condition than the one left at Lamont.

The first I knew something was wrong was when I heard a yell. I saw Lee Scovel reach out for the motor car and at

that time the motor car was slowing down. After I saw Scovel reach out I saw Graves under the push car with his head between the push car and the motor car. It looked to me as though Scovel was trying to keep the push car and the motor car from coming together. Just as the motor car speeded up he reached for it and he fell off the push car.

Re-Direct Examination by Mr. Grannis.

I don't know if Graves or Stone had their feet on the grab bar of the motor car when the accident happened.

ROBERT STONE, a witness named in the annexed notice, being of lawful age, and being first duly sworn in the above cause, testified on his oath as follows:

Direct Examination by Mr. Grannis.

My name is Robert Stone. I live three and a half miles north of Lamont, Iowa. I am a carpenter and have a small farm. On June 25, 1953, I was working as a section laborer for defendant. There were 13 or 14 men on the crew. We started out from Lamont intending to work at Oneida, which is east of Lamont. We had a push car and a motor car for transporting ourselves and our equipment and tools. The cars were located at Lamont and all the men checked in around 8:00 a.m. to put them on the track to couple them and load them. I don't remember if I had anything to do with the coupling.

We boarded the push car and motor car and set out for Oneida. I was sitting on the right hand corner of the push car. I was sitting next to Graves. Scovel was sitting in back of Graves and me and where the other men were sitting on the push car I don't know. Scovel was sitting in a crouched position on a fuse box. Graves was two or three feet from me.

The track was in decent shape. We were going somewhere between 10 and 15 miles per hour. We had just come up a little incline and leveled off. We had been going

faster prior to that time but probably slowed down a little pulling the grade. The grade starts at Lamont.

I was sitting on the corner and saw Graves pitch forward. It was about the same time that I saw the cars separate. It all happened about the same time. It happened like a snap of your fingers when I saw Graves pitch forward. As he pitched forward he bumped my shoulder and I almost fell off. I kind of pulled myself back on the car. I stayed there for a minute and then jumped off the right hand side. I couldn't say definitely that I saw Scovel fall, but I did see him out of the corner of my eye. I think he was standing in a crouched position. I don't know what caused him to fall.

Cross Examination by Mr. Hvass.

I was facing east as we were going down the track. I had my legs Indian fashion under me. I imagine Graves probably had his feet over on the motor car, but I don't know for sure. We sat that way, but Scovel had warned us not to as a matter of safety. I don't remember how Graves had his feet or how I had mine.

My signature appears on Plaintiff's Exhibit 2 on the first, second, third, fourth and fifth pages.

Interposing Examination by Mr. Grannis.

I don't know whether I got a copy of it or who took it. I don't remember his name. I did not write it. I read the statement before I signed it.

(The following portion of the Exhibit was read to the jury by Mr. Hvass:)

> "I was sitting with my legs under me Indian fashion. Ralph Graves was to my left in the middle of the car with his feet on the motor car."
>
> "We were traveling about 15 miles per hour and when we reached a point about two and a half miles east of Lamont the motor car and push car came uncoupled. The end at the push car came apart. When

this happened Graves fell forward. I yelled that the cars were separated and looked back for Graves as I thought he would be coming through under the car."

Cross Examination by Mr. Hvass.

Earlier Mr. Scovel had warned the men about putting their feet on the motor car. He had told us it was unsafe. We had been warned a number of times about it. I don't recall if I had my feet on the motor car. It all happened about the same time. The push car and motor car parted and Graves pitched forward. He kind of bumped me. I didn't really fall off. I was scared and got my balance.

I think Scovel was probably reaching forward trying to keep the motor car and push car from closing on Graves. I didn't definitely see him. Graves was between the push car and the motor car as he was hanging and Scovel was afraid if they would close they would close on his head.

All of the men were experienced. Graves had been with the railroad a long time. It was not my position to tell Graves how to sit or act. I don't know how Scovel was sitting.

I have been in Oelwein a number of times. I have seen trailer cars with seats and bars running down the middle. I have seen them pulled around and a bunch of men working, but I don't know what section they were on. We have never been furnished with these cars at Lamont. The only type of cars that we have are push cars and motor cars. The motor car has a seat for the men to sit on and put their feet on it. You stay on a push car by balance. There is no bar to hold onto. There were tools on the push car and there wasn't much room for the men to sit.

We were using the customary and ordinary type of pin for the coupler. The division engineer has seen us using that type of pin and has never told us not to use it. I have seen pins used on farm machinery that have a trigger on the end of the pin which prevents it from coming out. You depress the clip at the end of the pin to pull it out of the coupler.

Re-Direct Examination by Mr. Grannis.

Scovel did not warn Graves about his feet the day of the accident, but he had previous to that.

Plaintiff's Rebuttal.

F. N. SCOVEL, a witness named in the annexed notice, being of lawful age, and being first duly sworn in the above cause, testified on his oath as follows:

Cross Examination by Mr. Hvass.

I had been a foreman for the defendant during the summer of 1952. We had used a larger motor car for summer work. The push car involved in the accident had been in Lamont for a number of years.

Before the accident happened, I think my father had asked for a new push car. The push car involved in the accident was not good. It could have room for repairs, but it was not exactly out of service. The wheels were worn and the deck was worn. The worn wheels caused a lot of play and side movement of the car. The worn deck has no particular effect unless it is too bad and then it is unsafe for unloading.